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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 20

EARL P. HOINESS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Admiralty

No. 24322

EARL P. HOINESS, Libelant,

vs.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION OF THE UNITED STATES OF AMERICA, American South African Line, Inc., a corporation, The Doe Company, Richard Roe and John Doe, Respondents.

SEAMAN'S LIBEL IN PERSONAM—Filed July 16, 1945

(For benefits under Second Seamen's War Risk Policy, and for Damages, Wages, Maintenance and Cure under the Act of April 11, 1942, 46 USCA 1128-1128 (F) and under the Suits in Admiralty Act, The Jones Act and Public Law 17, 78th Congress)

[fol. 2] (Under 28 USCA 837 without prepayment of costs or fees and without security therefor)

To the Honorable the Judges of the Above Entitled Court:

The libel of Earl P. Hoiness, late seaman on the United States vessel SS Escanaba Victory, owned by the United States of America and the War Shipping Administration of the United States of America, and managed, navigated, maintained and operated by the American South African Line, Inc., a corporation, as general agents for the said United States of America and War Shipping Administration of the United States of America, against said owners and agents, and against all persons lawfully intervening for their interests, in a cause of action for benefits under the Second Seamen's War Risk Policy, and for damages, wages, maintenance and cure, civil and maritime, alleges:

I

That the United States vessel SS Escanaba Victory is a vessel of United States registry and now is, and during

all the times herein mentioned, was owned by the United States of America and the War Shipping Administration of the United States of America and was managed, maintained, operated and navigated by the American South African Line, Inc. as general agents for said United States of America and the War Shipping Administration for the United States of America.

II

That the respondent American South African Line, Inc. [fol. 3] has a main office and principal place of business in the City and County of San Francisco, State of California, and is within the jurisdiction of the above entitled Court.

III

That the respondents United States of America and the War Shipping Administration of the United States of America maintain offices and principal places of business in connection with the matters of which complaint is made in the within libel in the City and County of San Francisco, State of California, and said respondents are within the jurisdiction of the above entitled Court.

IV

That the respondents The Doe Company, Richard Roe and John Doe are fictitious names and libelant does not know the true names thereof and prays leave to insert said true names when ascertained.

V

That libelant is a merchant seaman and elects to take advantage of the provisions of 28 USCA 837 and to proceed herein without payment of costs or fees and without security therefor.

VI

That libelant brings and maintains this action pursuant to the provisions of the Act of April 11, 1942, Chap. 240; 56 Stat. 215; 46 USCA 1128-1128(F) Incl.; and also pursuant to the provisions of the Act of March 9, 1920, Chap. 95; 41 Stat. 525, 526 as amended, 46 USCA 741-752, com- [fol. 4] monly known as the "Suits in Admiralty Act"; and under the Act of June 5, 1920, Chap. 250, 41 Stat. 1007,

commonly known as the Jones Act, and also pursuant to Public Law 17, 78th Congress, Act of March 24, 1943.

VII

Libelant brings and maintains this action as against all the respondents other than the American South African Line, Inc., pursuant to the provisions of the Second Seamen's War Risk Policy, which policy of insurance was in full force and effect during all the times herein mentioned, and particularly in full force and effect for the voyage aboard the SS Escanaba Victory, during which voyage various occurrences took place which gave rise to the instant action as more fully particularly set forth hereinafter. That said Second Seamen's War Risk Policy was made, issued, signed and given effect by the respondents herein for and on behalf of libelant and seamen in like circumstances in connection with the voyage hereinafter more fully described. That a copy of said Second Seamen's War Risk Policy, which is set out in full in the Federal Register for March 20, 1943, P. 3456, is incorporated herein by this reference with the same force and effect as though fully set forth hereinafter.

VIII

That libelant was in the employ of respondents, and each of them, aboard said vessel for the period from August 10, 1944, when he joined the vessel at the port of Aberdeen, Washington, to and including January 15, 1945, when he was separated from said vessel at the port of San Francisco, California.

[fol. 5] IX

That on January 16, 1945, at or about the hour of 1:00 A.M. and while said vessel was docked at the port of San Francisco, California, libelant was on the main deck of said vessel, in the service of said vessel and in the employ of respondents and each of them, and that at said time and place there was attached to the service of and on said vessel a member of the United States Navy whose name was "Red" Howland, seaman 1/Cl. who was a member of the gun crew of said vessel.

That at said time and place the said Howland without provocation fired a bullet from a pistol at libelant causing him severe physical personal injuries, namely, internal

injuries to the abdomen, right chest; fracture of the tenth rib; and traumatic pleuritis, as result of which libelant was disabled and required hospitalization from January 16, 1945, to and including June 16, 1945 (so affiant is informed and believes and alleges), a period of five months. That as result of said disability libelant is entitled to and claims benefits under said Second Seamen's Risk Policy in the amount of $650.00.

X

That heretofore, to wit, on February 26, 1945, libelant by his counsel, filed written claim in and about the matter of which complaint is hereby made with the Chief Adjuster of the Division of Wartime Insurance of the War Shipping Administration of the United States of America, as required by the provisions as provided by the rules and [fol. 6] regulations adopted by said agency pursuant to the Act of March 24, 1943, and thereafter, to wit, on June 21, 1945 said claim was disallowed and denied by said agency.

XI

That all and singular the allegations hereof are true and are within the admiralty jurisdiction of the above entitled Court.

Wherefore, libelant prays judgment, etc.

As And For A Second, Separate And Additional Cause Of Action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of said first cause of action herein.

II

That on or about January 16, 1945 at or about the hour of 1:00 P.M. said vessel was docked at the port of San Francisco, California; and libelant was in the service of said vessel and in the employ of respondents and each of them.

That at said time and place there was in the service of said vessel a person by the name of "Red" Howland Seaman 1/Cl, a member of the United States Navy, and of the gun crew of said vessel. That the said Howland was a

violent, pugilistic and unruly individual given to the use of force and physical violence against the civilian members of the crew of said vessel, including libelant, which facts were well known to respondents and each of them; and [fol. 7] particularly the master of said vessel. That respondents and each of them and the master of said vessel, who was an employee and agent of the United States of America in and about matters of which complaint is herein made, failed to control, supervise and discipline said Howland, which conduct on the part of respondents and each of them rendered said vessel unseaworthy and constituted negligence on the part of respondents and each of them.

That at the time and place mentioned said Howland fired a bullet from a pistol at libelant causing libelant grievous and severe physical injuries as more particularly described hereinafter, which injuries were the direct and proximate result of the failure of respondents and each of them to maintain said vessel in a seaworthy condition, and which resulted from the negligence of respondents and each of them as hereinabove alleged.

III

That as result of the acts of which complaint is herein made libelant suffered the following personal injuries: a bullet wound of the abdomen and bullet wound of the right chest, fracture of the tenth rib, and traumatic pleuritis. That said injuries caused libelant grievous and severe physical and mental pain and suffering, and required hospitalization at the San Francisco Hospital and the United States Marine Hospital; and that libelant was operated upon as result of said injuries.

Libelant is informed and believes and alleges that he will suffer permanent disability, namely, a weakness of the stomach and right chest as result of said injuries. That as [fol. 8] result of said injuries libelant has suffered general damage in the sum of $35,000.00.

IV

That heretofore, to wit, on February 26, 1945, libelant made claim upon respondents and each of them in and about the matters of which complaint is herein made, and as provided by the regulations of the Act of March 24, 1943, but

said claim has been administratively disallowed by said respondents.

Wherefore, libelant prays judgment, etc.

As and for a third, separate and additional cause of action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the first cause of action herein, and paragraphs I and IV of the second cause of action herein.

II

That on January 16, 1945 while said vessel was docked at the port of San Francisco, California, respondents suffered personal injuries in the service of said vessel when he was shot by a pistol bullet by one "Red" Howland, said injuries consisting of the following: a bullet wound of the abdomen and bullet wound of the right chest, fracture of the tenth rib, and traumatic pleuritis.

III

[fol. 9] That libelant required hospitalization on account of said injuries. That libelant was discharged from the United States Marine Hospital at San Francisco on or about March 20, 1945. That thereafter libelant was unable to work on account of said injuries, so affiant is informed and believes and alleges, until June 16, 1945, a period of eighty-eight (88) days.

Libelant is entitled to maintenance money in the reasonable sum of $5.00 daily during said period of time, or maintenance money in the sum of $440.00, which sum is presently due, owing and unpaid for respondents to libelant.

Wherefore, libelant prays judgment, etc.

As and for a fourth, separate and additional cause of action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the first cause of action here-

in, and paragraphs I and IV of the second cause of action herein, and paragraphs II of third cause of action herein.

II

Libelant is entitled to and claims wages at the rate of $87.50 per month from January 16, 1945 to and including June 16, 1945, a period of five months, or wages in the sum of $437.50, which sum is presently due, owing and unpaid from respondents and each of them to libelant.

[fol. 10] Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against said respondents and each of them and that citation in personam may issue against said respondents and each of them and that they be cited and required to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment by respondents and each of them of the sum of $35,877.50, and as against the United States of America and War Shipping Administration of the United States of America the sum of $650.00, together with costs of suit herein, and that libelant may have such other and further relief as is meet and just in the premises.

Dated: July 3, 1945.

Andersen & Resner, by Herbert Resner

Verification

[File endorsement omitted.]

[fol. 11] In United States District Court

Answer of the Respondent United States of America—Filed September 10, 1945

Comes now respondent, United States of America, and answering the libel herein alleges as follows:

As to the First Cause of Action.

I

Answering the allegations of Article 1, respondent alleges that it is the owner and operator of the SS Escanaba Victory and that the American South African Line, Inc., is the

general agent for this respondent in respect to the said vessel.

II

Denies each and every, all and singular, the allegations of Article II.

III

Admits the allegations of Article III.

IV

Respondent has no information or belief upon this subject as to the allegations contained in Article IV, and placing its denial upon said ground denies the same.

V

Admits the allegations in Article V.

VI

Answering the allegations of Article VI, respondent leaves all questions of jurisdiction to the Court.

VII

Respondent admits that the Second Seamen's War Risk Policy was in full force and effect in respect to the libelant [fol. 12] while aboard the SS Escanaba Victory from August 10, 1944, to January 15, 1945, and with this exception denies that libelant has any right under the Second Seamen's War Risk Policy, or otherwise, or at all, and on that ground denies the remainder of the allegations contained in Article VII.

VIII

Answering the allegations of Article VIII, this respondent alleges that libelant entered into shipping articles with the United States of America, thru the War Shipping Administration, on or about August 10, 1944, and alleges that said libelant was separated from his employment on January 15, 1945.

IX

Answering the allegations of Article IX, respondent alleges that on January 16, 1945, the SS Escanaba Victory was docked at San Francisco, California, and that at said

time there was attached to the service of the vessel as a member of the United States Navy and a member of the Armed Guard, a seaman first class by the name of Red Howland. Further answering the allegations of Article IX respondent denies that libelant was in the employ of said respondent during any of the said times mentioned in Article IX. With these exceptions, respondent has no information or belief on the subject sufficient to enable it to answer the allegations in Article IX, and placing its denial upon said ground denies the same.

X

Denies each and every, all and singular, the allegations of Article X.

[fol. 13]

XI

Denies each and every, all and singular, the allegations of Article XI.

As to the Second Cause of Action:

I

Answering the allegations of Article I thereof, respondent refers to all of the admissions, denials and allegations contained in its answer to the first cause of action herein incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Answering the allegations of Article II, respondent alleges that on January 16, 1945, said vessel SS Escanaba Victory was docked at San Francisco, California; and further answering the allegations of Article II alleges that at the said time and place on said vessel there was a member of the United States Navy, a member of the Armed Guard, aboard said vessel by the name of Red Howland, Seaman first class, and with these exceptions denies the allegations contained in Article II.

III

Answering the allegations of Article III, respondent denies that any of the injuries or damages alleged therein are a, or any, result of his said employment aboard the SS Escanaba Victory. Specifically denies that libelant has

been damaged in the sum of $35,000, or in any other sum or sums, or otherwise, or at all. With these exceptions, respondent has no information upon the subject which would enable him to answer the allegations of Article III thereof, [fol. 14] and placing its denial upon said ground, denies the same.

IV

Denies each and every, all and singular, the allegations of Article IV.

Further answering libelant's 2nd cause of action and as a separate, special and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel were cause solely and proximately by the wrongful acts of one Red Howland, Seaman 1/c United States Navy, and a member of the gun crew or armed guard placed aboard the said vessel by the United States Navy and a person whom the Master and officers of said vessel had no control, supervision or authority, and were not caused or contributed to in any manner by any negligence of respondents, their servants, agents, representatives or persons for whom they are responsible or by reason of any defect, insufficiency or unseaworthiness of said vessel. That by reason of the premisses if said vessel were privately owned or operated no proceeding in admiralty could be maintained against the respondents as required by Section 2 of the "Suits in Admiralty Act", 1920 (46 USC 742) and accordingly the United States has not consented to be sued therefore, and this court has no jurisdiction of respondent United States of America.

As to the Third Cause of Action:

I

Answering the allegations of Article I thereof, respondent refers to all of the admissions, denials and allegations con- [fol. 15] tained in its answer to the first cause of action herein and incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Answering the allegations of Article II, this respondent alleges that the SS Escanaba Victory was docked at San

Francisco, California on January 16, 1945, and with these exceptions denies the allegations of Article II thereof.

III

Answering the allegations of Article III thereof, respondent has no information or belief in respect to the period of libelant's hospitalization or time of discharge, and placing its denial upon said ground, denies the same. Specifically denies that libelant is entitled to maintenance money in the sum of $440.00, or any other sum or sums, or otherwise, or at all.

Further answering to the 3rd cause of action and as a special, separate and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel, did not result from the negligence of any of the officers, agents or employees of said vessel, or by reason of any defect or insufficiency or unseaworthiness therein, but the same were caused solely and proximately by the gross negligence or wilful misconduct of the libelant or the result of his own vices.

As to the Fourth Cause of Action:

I

Answering the allegations of Article I thereof, respondent [fol. 16] refers to all of the admissions, denials and allegations contained in its answer to the first cause of action herein and incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Denies each and every, all and singular, the allegations of Article II. Specifically denies that libelant is entitled to the sum of $437.50, or any other sum or sums, or otherwise, or at all.

Further answering the 4th cause of action and as a special, separate and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel, did not result from the negligence of any of the officers, agents or employees of said vessel,

or by reason of any defect or insufficiency or unseaworthiness therein, but the same were cause solely and proximately by the gross negligence or wilful misconduct of the libelant or the result of his own vices.

Wherefore, respondent prays that said libel be dismissed herein.

Frank J. Hennessy, United States Attorney, by W. E. Licking, Assistant U. S. Attorney, John H. Black, Ed. R. Kay, of Counsel for the United States of America.

[File endorsement omitted.]

[fol. 16a] IN UNITED STATES DISTRICT COURT

[Title omitted]

Reporter's Transcript—Thursday, April 4, 1946

COUNSEL APPEARING

For Libelant: Gladstein, Anderson, Resner, Sawyer & Edises, represented by Herbert Resner, Esq.

For Respondents: J. Hampton Hoge, Esq., and Henry W. Schaldach, Esq.

[fol. 16b] TESTIMONY OF EARL P. HOINESS

EARL P. HOINES: called on behalf of the libelant; sworn:

The Clerk:

Q. Will you state your name to the Court?

A. Earl P. Hoiness.

Direct Examination

Mr. Resner:

Q. Mr. Hoiness, what is your full name?

A. Earl Pershing Hoiness.

Q. Would you speak up loudly and distinctly so Counsel at the table can hear you and the Court can hear you.

Where do you live?

A. Portland, Oregon.

Q. What is your address there?

A. —

Q. Where were you born?
A. Braddock, North Dakota.
Q. How old are you?
A. Twenty-seven.
Q. Are you married?
A. No.
Q. Have you been?
A. Yes.
Q. Are you divorced from your wife?
A. Yes.
Q. Have you any children?
A. Yes.
Q. How old are they?
A. A boy, six and girl four.
Q. Do you support your children?
A. Yes.

Mr. Hoge: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Resner: I am showing his family surroundings, your [fol. 16c] Honor.

The Court: Objection overruled.

Mr. Resner:

Q. Mr. Hoiness, have you been in the past a merchant seaman by occupation?
A. Yes.
Q. When did you first go to sea?
A. September the 23rd, 1943.
Q. How old were you then?
A. Twenty-five.
Q. Prior to being a merchant seaman, what kind of work did you do?
A. Driving truck and worked in sawmills.
Q. In Oregon?
A. Yes.
Q. Has your home been in Oregon during recent years?
A. Yes, sir.
Q. Where did you get your training to be a seaman?
A. Catalina Island.
Q. The United States Maritime Service?
A. Yes.

Q. How long did you serve there?

A. Two and half months.

Q. Prior to the Escanaba Victory, on what vessel did you sail?

A. Seaman A. Knapp and the Cape Charles and Escanaba Victory.

Q. Did all those vessels make journeys into Pacific waters during the war?

A. Yes.

Q. Your service was in the Pacific, is that correct?

A. Yes.

Q. What capacity?

A. Messman.

Q. When you first joined the vessel involved in this case, the Escanaba Victory, where was it?

A. In Portland, around June.

[fol. 16d] Q. June of 1944?

A. Yes.

Q. Did you make a short trip, first, to the Hawaiian Islands and return?

A. Yes.

Q. Did you stay with the vessel on the second journey?

A. Yes.

Q. When did you join the vessel the second time?

A. Aberdeen, Washington.

Q. When you went aboard for the first time, that is, with regard to the second journey, was it August 10?

A. I believe it was, yes.

Q. August 10, 1944?

A. Yes.

Q. At Aberdeen, Washington?

A. Yes.

Q. Subsequently you signed foreign shipping articles, is that correct?

A. Yes.

Q. Were those articles signed on August 17?

A. Yes.

Q. 1944 at Aberdeen, Washington?

A. Yes, sir.

Mr. Ressner: Counsel, I assume you are familiar with the articles?

Mr. Hoge: Yes.

Mr. Ressner: I have here a photostatic copy.

Q. I want to show the shipping articles of the voyage in question and ask you to look at them, the voyage which is dated at Aberdeen, Washington, August 10, 1944, and I direct your attention to a page and ask you if your name appears on one of these pages?

A. Yes.

Q. Earl P. Hoiness?

A. Yes.

[fol. 16e] Q. And looking across the line it indicates you got aboard on August 10 and signed articles on August 17?

A. Yes.

Q. And then I direct your attention to another page. That was the sign-on page I showed you?

A. Yes.

Q. I show you the sign-off page, and did you sign your name fifth from the bottom on Line 76?

A. Yes.

Q. And the sign-off date is blank, is that correct?

A. That is correct.

Q. Where did you sign off the articles?

A. In the hospital.

Mr. Resner: I should like to offer in evidence this photostatic copy of the shipping articles, your Honor.

The photostatic copy of shipping articles were thereupon received in evidence and marked Libelant's Exhibit No. 5.)

Mr. Resner:

Q. Approximately when did you sign off the articles?

A. It was around three weeks or so after I was in the hospital.

Q. That would bring it around the early part of February, 1945?

A. Yes, it would.

Q. When that vessel left Aberdeen in August of 1944, where did she go?

A. To Finschhafen.

Q. Finschhafen, New Guinea?

A. Yes.

Q. How long did you lay there?

A. Just over night.

Q. Where did you proceed from there?

A. From there we proceeded to Manis.

Q. That is in the Admiralty Islands?
A. In the Admiralty Islands, Yes.

• • • • • • •

[fol. 16f] Q. Did you ever go into the Navy mess hall or forecastle?
A. Once or twice, but after that I didn't go back any more than I needed to.
Q. None of the merchant crew did, either?
A. No, sir.
Q. Did Howland keep coming back to the merchant crew's mess hall?
A. Yes.
Q. Did he carry on this argument about the wages during the whole voyage?
A. Yes, sir.
Q. Did he argue with the entire merchant marine about this matter?
A. Most all of them, yes.
Q. When did the vessel leave the Philippines?
A. Christmas Day.
Q. Did you come to San Francisco?
A. Yes.
Q. Did you stop enroute?
A. Yes, we stopped at Hollandia to fix the boilers.
Q. Then w-ere did you go?
A. To San Francisco.
Q. Do you know when you arrived?
A. It was on the 14th or 15th.
Q. Of what?
A. January.
Q. 1945?
A. Yes.
Q. Did you go ashore your first night you were here?
A. No.
Q. Did you go ashore the second day?
A. Yes.
Q. Did you stay ashore?
A. I stayed ashore.
Q. Did you come back the following day to the ship?
A. Yes.
[fol. 16g] Q. When was the payoff supposed to be?
A. The 16th.

Q. What time did you get back aboard the ship on the 16th?

A. Approximately 2:30.

Q. Two-thirty?

A. Yes.

Q. When you got on the ship where did you go?

A. I went to the boatswain's forecastle.

Q. Who was there?

A. The boatswain and two or three others of the merchant crew, and Red Howland was standing there.

Q. What were the names of the merchant crew there?

A. There was Henry Williams, Perrault, Bliss and Davis.

Q. What were you men doing?

A. Sitting in there talking.

Q. Did you have some drinks in there at that time?

A. Yes, they had a bottle and had about one drink—a round.

Q. And you were sitting there for the payoff?

A. Yes.

Q. Did Howland appear at that time?

A. Yes.

Q. What did he say?

A. He started bring up the argument and called me a Communist..

Q. What did he say?

A. I said I didn't think I was and I said, "I wish you would leave us alone and go on".

Q. What happened?

A. He just pulled out his gun and held it on me.

Q. On you or all of you?

A. All of us.

Q. Was he on watch at the time?

A. He was on gangway watch.

• • • • • • •

[fol. 17] IN UNITED STATES DISTRICT COURT

OPINION—Filed August 5, 1946

ST. SURE, District Judge:

This is a libel in personam primarily against the United States. The War Shipping Administration and American

South African Line were treated as nominal parties only. In brief, libelant seeks to recover insurance benefits, damages, wages and maintenance. Each of these claims is stated in a separate cause of action.

In paraphrase the libelant alleges that he is a merchant seaman; that the SS Escanaba Victory was a vessel owned by the United States and the War Shipping Administration; that it was of United States registry and at all pertinent times was operated, managed, navigated and controlled the American South African Line, Inc., as general agent; that the operating agent has a main office and principal place of business in San Francisco within the jurisdiction of this court; that the United States and the War Shipping Administration maintain offices and principal places of business in San Francisco and within the jurisdiction of the court; that this action is brought and maintained under the Second Seaman's War Risk Insurance Act, the Suits in Admiralty Act, the Jones Act and Public Law 17, 78th Congress, Act of March 24, 1943; "that libelant was in the employ of the respondents and each of them aboard the said vessel for the period from August 10, 1944, when he joined the vessel at the port of Aberdeen, Washington, to and including January 15, 1945, when he separated from [fol. 18] said vessel at the port of San Francisco . . . that on January 16, 1945 . . . while said vessel was docked at the port of San Francisco . . . (and while) libelant was on the main deck in the service of the said vessel and in the employ of respondents and each of them," he was shot and seriously wounded by a member of the United States Navy who was also a member of the vessel's gun crew; that the vessel was covered by a war risk policy under which he was entitled to benefits; that his claim therefor had been filed with the proper authority and had been disallowed. Ultimate facts pleaded in the first cause of action were incorporated by reference in the other three. To the foregoing were added allegations that with full knowledge of the "violent" and "unruly" propensities of the individual who shot libelant, respondents failed to control or supervise or discipline that individual, which conduct constituted negligence by which the vessel was rendered unseaworthy; that the injuries suffered were the direct and proximate result of the negligence of respondents. Prayer was for $35,000 damages. The remaining causes added that

libelant was entitled to maintenance and wages, respectively.

There were no exceptions to the libel, nor was there a motion to dismiss.

The answer of the United States and of American South African Line, Inc., denied libelant's right to benefits; denied his employment; denied negligence and affirmatively alleged that the injuries were solely and proximately caused by a member of the Navy over whom libelants had no control and by the wilful misconduct of libelant, or were the [fol. 19] result of his own vices. Each answer contained the following ". . . respondent leaves all questions of jurisdiction to the Court."

The case was heard on the merits and submitted.

Examination of the libel reveals that allegations of facts essential to the Court's jurisdiction have been omitted. The Second Seaman's War Risk Insurance Act (Act April 11, 1942, c. 240, 56 Stat. 215, 46 USCA § § 1128-1128h) so far as pertinent (1128d) provides:

> "In the event of disagreement as to claim for losses or amount thereof, on account of insurance under sections 1128-1128h . . . an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service."

Further that "Said suits shall proceed and shall be determined according to the provisions of the (Suits in Admiralty Act) in so far as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of sections 1128-1128h."

There is no intimation in the libel that libelant is a resident within the jurisdiction of this court, or that he has no residence in the United States.

The first section of the Suits in Admiralty Act (Act Mar. 9, 1920, c. 95, 41 Stat. 525, as amended, 46 USCA § 741) provides:

"No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States . . . or operated by or for the United States or such corporation . . . shall in view of the provision herein for a libel in personam, [fol. 20] be subject to arrest or seizure by judicial process . . ."

Section 2 (46 USCA § 742) provides:

"In cases where if such vessel were privately owned or operated . . : a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of business . . . or in which the vessel . . . charged with liability is found."

This libel does not allege that libelant has his principal place of business within the court's jurdisdiction, or that the vessel, at the commencement of the action, was found within this district. It is obvious, therefore, that the libel is fatally defective.

Notwithstanding the libel failed to allege that the injury was suffered on a vessel lying in navigable waters, it is obvious that the cause of action is based on a maritime tort. The Suits in Admiralty Act provides the exclusive remedy in admiralty against the United States and the War Shipping Administration for such a tort. (Eastern Transportation Co. v. United States, 272 U.S. 675; Emergency Fleet Corp. vs. Rosenberg Bros. & Co., 276 U.S. 202; Brady v. Roosevelt S.S. Co., 317 U.S. 575). Public Law 17, 78th Congress Act March 24, 1943 (57 Stat. 45, 50 USCA § 1297) avails libelant nothing, for it also provides that claims administratively disallowed may be enforced pursuant to the Suits in Admiralty Act.

[fol. 21] It follows that the libel must be dismissed for lack of jurisdiction as to the United States and the War Shipping Administration. (Blamberg Bros. v. United States, 260 U.S. 452; Carroll v. United States, 2d Cir., 133 F. 2d

690; Lopez v. United States, 59 F. Supp. 831; Abbott v. United States (D.C. N.Y.) 60 F. Supp. 700).

Elimination of the government and the War Shipping Administration leaves the question of jurisdiction with respect to the American South African Line, Inc.,

If libelant relied on the Jones Act (Act June 5, 1920, c. 250, § 33, 41 Stat. 988, 46 USCA § 688) so far as the operating agent is concerned, the libel fails to allege that the injury was suffered "in course of" libelant's employment, or any fact from which an inference that he was so injured could be drawn. On the contrary, his allegations are that he was employed to and including January 15, and that his injury occurred on January 16, 1945. In the absence of an allegation that libelant was re-employed after he separated from the vessel on January 15, or that separation from the vessel did not terminate his employment, the conclusion is warranted that at the time he was injured he was either a trespasser, a passenger or a guest. As such, and disregarding the fact that he sued as a seaman, the libel still fails to allege facts essential to the court's jurisdiction, in admiralty or otherwise.

The libel is dismissed for lack of jurisdiction. Counsel may submit findings of fact and conclusions of law in accord with this opinion.

Dated August 5, 1946.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING LIBEL—Filed August 15, 1946

It is ordered:

That the libel herein is dismissed for lack of jurisdiction, and that respondents have judgment for costs.

Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of court and the opinion filed herewith.

(s) A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER DENYING MOTION "TO REOPEN THE CAUSE"—Filed August 15, 1946

Libelant has moved "to reopen" this cause "for the purpose of amending the libel to conform to the proof, and for further proceedings". Counsel has cited an authority in support of that procedure and, in addition, asserts that by its general appearance the United States "waived any objection to the jurisdiction of the court and the court therefore had jurisdiction". Filed with the notice of motion is a stipulation signed by government counsel, to the effect that the motion may be granted.

The libel was dismissed for lack of jurisdiction. The government did not challenge the jurisdiction of the court, and there was neither allegation nor proof of ultimate facts essential to support a judgment on any one of the four causes of action.

Failure of respondents' counsel to challenge jurisdiction by motion to dismiss, or exceptions to the libel or by answer, thrust upon the Court not only the burden but the duty, sua sponte, to determine its jurisdiction to consider the merits. (Minnesota v. Hitchcock, 185 U. S. 373, 382; Matthews v. Rodgers, 284 U.S. 521, 524; Twist v. Prairie Oil Co., 274 U.S. 684, 690; Bell v. Hood, 9 Cir., 150 F. 2d 96, 99; Emmons v. Smitt, 6 Cir., 149 F. 2d 869, 871; Millslagle v. Olson, 8 Cir., 130 F. 2d 212, 213; De Filipps v. Chrysler Sales Corp., 2 Cir., 127 F. 2d 530, 531; Orth v. Transit In-
[fols. 24-27] vestment Corp., 3 Cir., 132 F. 2d 939, 941).

Non-existent jurisdiction is never waived; nor can it be conferred by consent of the parties. (City of Gainesville v. Brown-Crummer Co., 277 U. S. 54; Cutler v. Rae, 7 How. 729, 731; Pittsburgh Etc. Ry. Co. v. Ramsey, 22 Wall 322, 327; Mitchell v. Mauer, 293 U.S. 310, 313).

Admitting that seamen are often treated as wards of the Court and that strict application of ordinary rules of pleading and practice is often relaxed in admiralty cases, the interests of justice in this case do not require nor warrant any further proceedings. To grant this motion would be tantamount to granting libelant a new trial. There is no reason therefor. There are cogent reasons disclosed by the records for denying the motion.

It is therefore ordered that the motion be, and the same hereby is denied.

(S.) A. F. St. Sure, United States District Judge.

Dated: August 15, 1946.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed October 14, 1946

The above entitled matter came on regularly for trial on April 4, and 5, 1946, Herbert Resner, Esq., of the firm of Gladstein Anderson Resner Sawyer & Edises appearing for libelant; Frank J. Hennessy, United States Attorney, by William E. Licking, Assistant United States Attorney, appearing for the United States of America, War Shipping Administration, and J. Hampton Hoge, Esq., and Henry W. Schaldash, Esq., appearing for American South African Line, Inc., and the Court having rendered its opinion herein, now makes its findings of fact and conclusions of law:

FINDINGS OF FACT

I

The libel herein fails to allege that libelant is a resident within the jurisdiction of this Court, or that he has no residence within the United States. (Second Seamen's War Risk Insurance Act, 46 USCA 1128(d)).

II

The libel fails to all-ge that libelant had a principal place of business within the jurisdiction of this Court or that the Escanaba Victory was found within this district at any time. (Suits in Admiralty Act, 46 USCA 741,742).

III

The libel fails to allege that at the time of libelant's al- [fol. 29] leged injury the Escanaba Victory was lying in navigable waters.

IV

The libel fails to allege that the injury allegedly suffered by libelant was suffered in course of his employment. (Jones Act, USCA 688).

V

Allegations of the libel reveal that the alleged injury was suffered after libelant's employment on the Escanaba Victory was terminated.

VI

No evidence was offered in respect to any ultimate fact essential to a showing of jurisdiction.

VII

The libel fails to allege any fact disclosing libelant's right to sue the United States.

Conclusions of Law

I

The libel fails to state a claim upon which relief could be granted.

II

The Court was without jurisdiction to entertain the cause on the merits.

A. F. St. Sure, United States District Judge.

October 10, 1946.

[File endorsement omitted.]

[fol. 30] In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 24322S

Earl P. Hoiness, Libelant,

vs.

United States of America, War Shipping Administration of the United States of America, American South African Line, Inc., a Corporation, The Doe Company, Richard Roe and John Doe, Respondents

Decree—Filed October 14, 1946

This cause came on regularly to be heard before the court on April 4 and 5, 1946, the Honorable A. J. St. Sure presid-

ing, sitting without a jury; the libelant was present in person and represented by his proctors, and the United States of America and American South African Line, Inc. was represented by their proctors; and thereupon oral and documentary evidence was introduced on behalf of each of the parties hereto, and evidence having been concluded, the cause was argued to the Court by respective counsel, and at the close of argument submitted to the Court for decision, and thereupon the Court, being advised in the premises, made and signed and ordered filed herein its findings of fact [fol. 31] and conclusions of law which are by reference made a part hereof.

Wherefore, by reason of the law and the evidence and the premises, and the findings of fact and conclusions of law, as aforesaid, it is ordered, adjudged and decreed that the above-entitled Court has no jurisdiction over the subject matter of the action, and that the libel be dismissed.

Dated: October 14, 1946.

A. F. St. Sure, United States District Judge.

[File endorsement omitted.]

[fol. 32] In United States District Court

Libelant's Petition for Appeal and for Leave to Proceed on Appeal Without Bond, Fee, or Costs—Under 28 U. S. C. A. 837—Filed October 18, 1946

Comes now the libelant herein, Earl P. Hoiness, and being aggrieved by the rulings, findings, judgment and decree made and entered herein on October 14, 1946, by the above-entitled United States District Court, does hereby claim an appeal from said rulings, findings, judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his said appeal may be allowed.

The points and grounds of appeal are the following:

1. The decree and judgment of the Court dismissing the above-entitled action upon the ground that the Court lacked jurisdiction is contrary to law and is in error.

2. The Court erred in failing to consider and determine the above-entitled cause on its merits.

3. Respondent United States of America waived any jurisdictional defect by appearing, pleading, answering to the merits, and trying the case on the merits.

4. The Court erred in making findings of fact and conclusions of law based upon the Court's erroneous order and finding that the Court was without jurisdiction.

5. The judgment and decree are contrary to law and to the evidence, and the Court should have considered the case on its merits and found a decree in favor of libelant.

Libelant prays leave to prosecute this appeal without furnishing bond or making any prepayment or deposit to [fol. 33] secure fees or costs, under the provisions of 28 U. S. C. A. 837.

Dated: September 15, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises,
(S.) Herbert Resner, Proctors for Libelant and Appellant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed October 18, 1946

The within appeal is hereby allowed.

It is further ordered that libelant is granted leave to prosecute this appeal without furnishing bond and without prepayment or making deposit to secure fees or costs, under provisions of 28 U. S. C. A. 837.

Done in Open Court this 18th day of September, 1946.

(S.) A. F. St. Sure, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 18, 1946

Comes now the libelant herein, Earl P. Hoiness, and hereby assigns as error in the proceedings, orders, decision, judgment and decree of the above-named District Court in the above-entitled action the following:

1. That the District Court erred in finding a decree in favor of the respondent United States of America and against libelant Earl P. Hoiness.

2. That the District Court erred in allowing the Findings of Fact and Conclusions of Law proposed by respondent United States of America and in refusing to allow the amendments thereto proposed by libelant.

3. That the District Court erred in its Order and Decree dismissing the above-entitled action upon the ground that the Court lacked jurisdiction over the subject matter.

4. That the District Court erred in refusing to consider the above-entitled case on its merits, the respondent having submitted to the jurisdiction of the Court and having waived any jurisdictional requirements or defects.

5. That the District Court should have considered the case on its merits and should have found a decree in favor of libelant.

6. That the decree herein in favor of respondent and against libelant is contrary to the evidence adduced at said trial.

7. That the decree herein in favor of respondent and against libellant is contrary to the law.

[fols. 35-38] Dated: October 15, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises, (S.)
Herbert Resner, Proctors for Libelant and Appellant.

(Receipt of Copy)

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO REOPEN CAUSE FOR THE PURPOSE OF AMENDING PLEADINGS AND FURTHER PROCEEDINGS—Filed August 12, 1946

To Respondent United States of America and
To Messrs. Frank J. Hennessy, William E. Licking, John H. Black, Edward R. Kay, Henry Schaldach, and J. Hampton Hoge, Its Proctors:

You Will Each Please Take Notice that libelant, by his proctor Herbert Resner, will move the above-entitled Court for its order on Monday, August 12, 1946, at the hour of 10 [fol. 40] o'clock a. m., at the courtroom of said Court, Post Office Building, 7th and Mission Streets, San Francisco, California, before the Honorable A. F. St. Sure, Judge thereof, to reopen the said cause for the purpose of amending the libel to conform to the proof, and for further proceedings.

Said motion will be based upon this notice, upon all of the files, records, papers, and proceedings in the within cause, upon the Memorandum of Points and Authorities attached hereto and filed herewith, and upon argument of counsel.

Dated: August 10, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises, Herbert Resner, Proctors for Libelant.

MEMORANDUM OF POINTS AND AUTHORITIES

I

In admiralty on a proper showing and in the furtherance of justice, after a hearing is concluded, the case may be reopened and further proof received.

DeSoyza v. Dollar SS Lines, 292 Fed. 490.

II

The United States in this case, by appearing and pleading to the merits, waived any objection to the jurisdiction of the court, and the court therefore had jurisdiction.

[fol. 41] *Jarnvagsstyrelsen v. U. S.*, C. C. A. N. Y. 1927, 19 F. 2d 761

Commercial Trust Co. v. United States Shipping Board Emergency Fleet Corporation, C. C. A. N. Y. 1931, 48 F. 2d 113.

Receipt of Service of Copy.

[File endorsement omitted.]

[fols. 42-47] In United States District Court

[Title omitted]

Stipulation—Filed August 12, 1946

It is hereby stipulated by and between respective counsel that the motion on behalf of libelant to reopen the above matter for the taking of further testimony and amending said libel be granted by the above court.

Dated August 9, 1946.

Herbert Resner, Proctor for libelant. Frank J. Hennessy, United States Attorney, by W. E. Licking. John H. Black, Edw. R. Kay, Of Counsel for United States of America and proctors for American South African Line, Inc.

[File endorsement omitted.]

[fol. 47-a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,479

EARL P. HOINESS, Appellant,

vs.

UNITED STATES OF AMERICA, et al., Appellees

Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before Mathews, Healy and Bone, Circuit Judges

OPINION—Filed November 18, 1947

MATHEWS, Circuit Judge.

Appellant (Earl P. Hoiness) filed a libel in personam against appellees (The United States, the American South African Line, Incorporated, and others) in the District Court of the United States for the Northern District of California. The named appellees answered the libel. The others did not answer and, so far as the record shows, were not served with process. A trial was had. Thereafter, without considering the evidence, the court concluded that it lacked jurisdiction, and that the libel, therefore, should be dismissed. These conclusions were stated by the court in an opinion filed on August 5, 1946.[1] Thereupon, on August 5, 1946, the court entered an order dismissing the libel.[2] [fol. 48] The order of August 5, 1946, was a final decision, within the meaning of § 128(a) of the Judicial Code, 28

[1] We quote from the opinion: "Examination of the libel reveals that allegations of facts essential to the court's jurisdiction have been omitted * * * It is obvious, therefore, that the libel is fatally defective. * * * It follows that the libel must be dismissed for lack of jurisdiction."

[2] The order of August 5, 1946, was as follows: "It is ordered: That the libel herein is dismissed for lack of jurisdiction, and that respondents [appellees] have judgment for costs. Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of the court and the opinion filed herewith."

U. S. C. A. § 225(a), and was appealable,[3] but no appeal was taken therefrom.

The concluding sentence of the order of August 5, 1946,[4] directed appellees' counsel to submit findings of fact and conclusions of law. There was no apparent reason for such a direction. The court's conclusions of law were stated in its opinion.[5] If its conclusions were correct, no findings of fact were necessary, for its conclusions were based on the libel, not on the evidence. No question of fact was considered or decided.

A document entitled "Findings of fact and conclusions of law" was filed on October 14, 1946.[6] An examination of the document reveals that the so-called findings stated therein were not findings of fact. The stated conclusions were that the libel failed to state a claim upon which relief could be granted, and that the court was "without jurisdiction to entertain the cause on the merits."

There was also filed on October 14, 1946, a so-called decree purporting to dismiss the libel which, in fact, was dismissed by the order of August 5, 1946.[7] From the so-called decree of October 14, 1946, this appeal was taken on October 18, 1946.[8]

As heretofore stated, the order of August 5, 1946, was a final decision. There was no other final decision in this

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[3] Liberty Mutual Ins. Co. v. Pillsbury, 9 Cir., 154 F. 2d 559.

[4] See footnote 2.

[5] See footnote 1.

[6] Whether this document was submitted by counsel or prepared by the court without the aid of counsel the record does not show.

[7] The so-called decree of October 14, 1946, was "that the [District] Court has no jurisdiction over the subject matter of the action, and that the libel be dismissed."

[8] The petition for appeal stated that appellant, "being aggrieved by the rulings, findings, judgment and decree made and entered herein on October 14, 1946, * * * does hereby claim an appeal from said rulings, findings, judgment and decree * * * and prays that his said appeal may be allowed." Said appeal was allowed on October 18, 1946.

case. No other final decision was necessary. The so-called decree of October 14, 1946, was not a final decision and was not appealable.[*]

Appeal dismissed.

[fol. 49] DISSENTING OPINION

HEALY, Circuit Judge, Dissenting:

I think we may, without doing violence to the statute, treat the decree of October 14, 1946 as a "final decision." Clearly, the trial court understood it to be such, and the parties on both sides have so treated it for the purposes of the appeal.

Generally speaking, where an order or judgment has been entered effecting the final disposition of a cause, the federal appellate courts have applied the principle that the subsequent entry of a second judgment, making an identical disposition, can not be permitted to operate as an extension of the statutory period for appeal. Accordingly, appeals from such later judgments are commonly dismissed where taken after expiration of the statutory time for appeal from the first judgment.[1] The rule is a salutary one, serving, as it does, to vindicate a substantial requirement of law. Such was the situation obtaining in the only authority cited in the majority opinion, namely, Liberty Mutual Ins. Co. v. Pillsbury, 9 Cir., 154 F. 2d 559. There the order held to be a final decision was entered December 26, 1944, whereas the appeal from the later decree was not taken until April 24, 1945, that is, more than three months after the entry of the order of December 26.[2] The dismissal was therefore in harmony with the current of authority.

Here, however, the principle animating this line of cases is inapplicable. The appeal taken October 18, 1946 was timely whether taken from the order of August 5 or from the formal decree of October 14. Accordingly, instead of seizing upon some purely formal ground on which we may

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[*] Liberty Mutual Ins. Co. v. Pillsbury, supra.

[1] Cf., for example, Sosa v. Royal Bank of Canada, 1 Cir., 134 F. 2d 955.

[2] Consult 28 USCA §230.

dismiss the appeal, we ought, I think, inquire whether, under the circumstances shown by the record, we can and should entertain it. I am satisfied that we can and should.

In the first place, we can hardly quarrel with the form of the judgment appealed from. Considered by itself, it is in the usual form of a final decree. In the second place, the trial court plainly intended it to operate as such, that is to say, the order of August 5th was not intended to function as the ultimate judgment. Something remained to be done. The order, as appears from the quotation of it in [fol. 50] the majority opinion, directed counsel to "submit findings of fact and conclusions of law in accordance with the rules of the court and the opinion filed herewith." One can not doubt that the experienced judge, who had tried the cause on its facts, labored under the belief that findings and conclusions were requisite. He was probably justified in so believing. The pertinent admiralty rule (Rule 46½) requires that "in deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49." It is not accurate to say that no question of fact was considered or decided in the course of the findings. Finding VI states that "no evidence was offered in respect to any ultimate fact essential to a showing of jurisdiction." I think the intention of the trial judge should be given effect and the decree of October 14 accepted as the final decision, Rubber Co. v. Goodyear, 73 U. S. 153; Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. 2d 582.[3]

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[3] Rubber Co. v. Goodyear seems squarely in point. The question there was whether an order of November 28, 1866, or a formal decree entered December 5, 1866, was to be accepted as the final judgment. The acceptance of the first order as final would necessitate a dismissal of the appeal as untimely. The court said "that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause. We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the

I may add that, in light of the direction for the submission of findings and conclusions, counsel for appellant could not fairly be expected to proceed on the assumption that the order of August 5th was a final judgment, and on such assumption have appealed from it. Under the circumstances, since the appeal was timely whether taken from the order or from the judgment of October 14, I see no [fol. 51] good reason why, if such course be thought necessary, it can not be considered and entertained as though it were an appeal from the order. Compare Prescott Ry. Co. v. Atchison R. Co., 2 Cir., 84 Fed. 213.

[File endorsement omitted.]

[fols. 52-54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11479

EARL HOINESS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

DECREE—Filed and Entered November 18, 1947

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed.

[File endorsement omitted.]

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court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings." And in the Monarch Brewing Co. case, supra, this court, in denying a motion to dismiss an appeal from a subsequent judgment, expressed itself as satisfied that an earlier order "was not intended as the rendition of a judgment in favor of the defendant."

[fol. 55] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION IN RE PRINTING OF RECORD AND RECORD TO BE CONSIDERED ON THE HEARING HEREIN—Filed June 14, 1948

[fol. 56] It is hereby stipulated by and between counsel for the respective parties hereto that the following portions of the record herein shall be printed and shall constitute and be used and considered as the record on the hearing herein:

From Volume I of the Transcript of Record, the following items:

1) Seaman's Libel in Personam; page 1;
2) Answer of the Respondent United States of America; page 11;
3) Opinion of the Court; page17;
4) Order of the Court; page 22;
5) Memorandum Opinion and Order Denying Motion to Reopen the Cause; page 23;
6) Findings of Fact and Conclusions of Law; page 28;
7) Decree; page 30;
8) Libelant's Petition for Appeal and for Leave to Proceed on Appeal without Bond, Fee, or Costs—Under 28 USCA 837; page 32;
9) Order Allowing Appeal; page 33;
10) Assignments of Error; page 34;
11) Notice of Motion to Reopen Cause for the Purpose of Amending Pleadings and Further Proceedings; page 39;
[fol. 57] 12) Stipulation; page 42;
13) Opinion of the United States Circuit Court of Appeals for the Ninth Circuit; page 47-A;
14) Decree of the United States Circuit Court of Appeals, Ninth Circuit; page 52;

From Volume II, Reporter's Transcript, the following:

15) Testimony of Earl P. Hoiness, pages 4-7, inclusive;
16) Testimony of Earl P. Hoiness, pages 18-19, inclusive;

It is further stipulated by and between counsel for the respective parties hereto that the within case was tried on its merits by both parties herein and at no time herein did respondent United States of America object to the juris-

diction of the trial court to hear and determine the within cause.

Dated: June 2, 1948.

Herbert Resner, Counsel for Petitioner, Gladstein, Andersen, Resner & Sawyer, of Counsel.

Dated June 9, 1948.

Philip B. Perlman, Solicitor General, Counsel for Respondent.

[fol. 57a] [File endorsement omitted.]

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to questions (1) (b) and (2) (a) presented by the petition for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Herbert Resner. File No. 52834 U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 604, Earl P. Hoiness, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed February 17, 1948. Term No. 604 O.T. 1947.

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780150—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 604

EARL P. HOINESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner presents four questions for determination by this Court (Pet. 6–9; Br. 32–53):

a. Whether the Circuit Court of Appeals for the Ninth Circuit erred when it dismissed his appeal, taken on October 18, 1946, from the District Court's decree of October 14, 1946, on the ground that the District Court's earlier minute order of August 5, 1946, likewise dismissing the libel for lack of jurisdiction, was the final decision from which the appeal should have been taken.

b. Whether the provisions of Section 2 of the Suits in Admiralty Act (Act of March 9, 1920, ch. 95, sec. 2, 41 Stat. 525, 46 U. S. C. 742) concerning the district in

which suits against the United States under that Act shall be brought (Appendix, pp. 7–8) are jurisdictional or constitute venue requirements which may be waived by the United States.

c. Whether the United States is liable (under the Jones Act (Act of March 4, 1915, sec. 20, 38 Stat. 1185, as amended by the Act of June 5, 1920, sec. 33, 41 Stat. 1007, 46 U. S. C. 688), the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, as amended, 46 U. S. C. 741–752), and the War Shipping Administration (Clarification) Act (Act of March 24, 1943, 57 Stat. 45, as amended, 50 U. S. C. App., Supp. V, 1291)) to a member of the crew of a vessel owned and operated by the United States through the War Shipping Administration for an assault committed by a member of the Navy gun crew stationed aboard the vessel, (a) where the United States knew, or should have known, that the particular member of the gun crew was "of violent, aggressive or pugnacious nature," or, alternatively, (b) where the assault is committed in line of duty.

d. Whether the United States is liable, under the Second Seaman's War Risk Insurance Policy (8 Fed. Reg. 3455 *et seq.*) issued pursuant to the Merchant Marine Act, 1936, as amended (Act of June 29, 1936, 49 Stat. 1985, as amended, 46 U. S. C. 1128–1128g, Supp. V, 1128–1128h), for the injuries suffered by petitioner.

The United States believes that the first two questions are appropriate for consideration and decision by this Court, but that the latter two are neither ripe for determination nor properly presented in the current posture of this case.

1. In dismissing petitioner's appeal because his appeal papers stated it to have been taken from the decree of October 14, 1946, rather than from the order of August 5, 1946, although it was timely as to the earlier judgment, the Circuit Court of Appeals appears to have been unduly technical at the expense of substantial justice (R. 47A–48). Cf. R. S. 954, 28 U. S. C. 777; *Miller* v. *Hatfield,* 309 U. S. 1, 2. As Judge Healy points out in his dissent below, *Liberty Mutual Ins. Co.* v. *Pillsbury,* 154 F. 2d 559 (C. C. A. 9), certiorari denied, 329 U. S. 717, upon which the majority relies and which the Government believes to have been correctly decided, involved an appeal taken more than three months from the District Court's initial final order, but within three months from the later formal decree. Here, there was no such attempted extension of the appellant's statutory time to appeal.

2. Whether Section 2 of the Suits in Admiralty Act (Appendix, pp. 7–8) relates to jurisdiction or only to venue, a question not as yet determined by this Court,[1] is a matter of substan-

[1] The corresponding provision of the Tucker Act (28 U. S. C. 762) has been held to be a matter of venue rather than ju-

tial public importance which has occasioned a contrariety of views in the lower courts. The issue is one often faced in government admiralty litigation. Seamen's suits under the statute have become frequent as a result of direct government operation of merchant vessels during the emergency, and when the libelant files in a district other than that of his residence, which is often done, the power of the court to entertain the cause, even with the consent of the Government, is still unclear. The circuit courts of appeal have not spoken, but the Second Circuit has intimated that the provisions of Section 2 may not be jurisdictional in suits *in personam*. *McGhee* v. *United States,* 154 F. 2d 101, 104 (C. C. A. 2). Cf. *Carroll* v. *United States,* 133 F. 2d 690, 692–3 (C. C. A. 2). The admiralty district courts, which have passed upon this point, are sharply divided. Holding the statutory requirements to be jurisdictional, and not waivable, are the instant case (District Court for the Northern District of California, St. Sure, J.) (R. 21, 23–24); *Sawyer* v. *United States,* 66 F. Supp. 271 (S. D. N. Y., Kennedy, J.); *Abbott* v. *United States,* 61 F. Supp. 989, 991 (S. D. N. Y., Knox, J.) (semble, in part); and *Rodinciuc* v. *United States,* 1947 A. M. C. 951 (E. D. Pa., Gane, J.). Of the view that the provisions relate to venue, and therefore may be waived, are *Abbott* v. *United*

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risdiction. *United Staes* v. *Hvoslef*, 237 U. S. 1, 12; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 24.

States, 61 F. Supp. 989, 991–992 (S. D. N. Y., Knox, J.) (semble, in part); *McGhee* v. *United States,* 62 F. Supp. 224 (S. D. N. Y., Bright, J.); and *Metaxas* v. *United States,* 68 F. Supp. 667 (S. D. Calif., Mathes, J.). See also *Haesen* v. *United States,* 66 F. Supp. 759, 760–761 (E. D. N. Y.); *Barnes* v. *United States,* 67 F. Supp. 571, 573 (S. D. N. Y.). In this state of the decisions, we do not oppose the granting of the writ to review this question and to determine to what extent, and in what manner, the requirements of Section 2 may be waived by the United States.

3. The third question presented by the petitioner, concerning the alleged assault by a member of the naval armed guard, can neither be canvassed nor decided apart from the particular facts of the case, which facts neither of the lower courts has found. A full trial was had, much conflicting testimony was given, and the record presents several direct contradictions on material facts. Although the evidence is here in written form, and the Court is empowered to find the facts for itself (*Johnson* v. *United States,* No. 138, this Term, decided February 9, 1948), it would appear preferable in litigation of this character to have the testimony sifted and the facts initially found by the District Court. Such issues of law as may survive a determination of the facts can then be decided, in ordinary course, in the light of the actual circumstances.

4. Proper resolution of petitioner's last ques-

tion, concerning the liability of the United States under the Second Seamen's War Risk Policy for the alleged assault, likewise largely depends upon the facts, which remain to be determined.[2]

For the foregoing reasons, we do not oppose the granting of the writ of certiorari to review the questions pertaining to (a) the propriety of the Circuit Court of Appeals' dismissal of petitioner's appeal, and (b) the nature of the requirements of Section 2 of the Suits in Admiralty Act. We believe, however, that the petition should not be granted with respect to the other questions presented.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

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[2] Petitioner recognizes that the third and fourth questions are linked together, and that he might recover either damages or insurance benefits, but not both. Br. 53–54. Neither of the lower courts passed upon either the third or the fourth questions.

APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. 746, *et seq.*) provide as follows:

SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo

charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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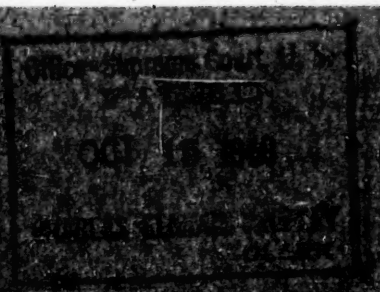

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No. 21

In the Supreme Court of the United States

October Term, 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 20

EARL P. HOINESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (R. 17–21) is reported at 75 F. Supp. 289. The majority and dissenting opinions of the Court of Appeals for the Ninth Circuit (R. 30–34) are reported at 165 F. 2d 504.

JURISDICTION

The decree of the Court of Appeals for the Ninth Circuit dismissing petitioner's appeal was entered November 18, 1947 (R. 34). The petition for certiorari was filed on February 17, 1948,

and was granted on March 29, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The writ of certiorari granted in this cause (R. 36) is limited to questions (1) (b) and (2) (a) as presented by the petition (Pet. 6–8). The United States did not oppose the granting of the writ with respect to these two questions, which may be summarized as follows:

1. Whether the circuit court of appeals erred in dismissing petitioner's timely appeal of October 18, 1946, taken specifically from the district court's formal decree of October 14, 1946, purporting to dismiss the libel for lack of jurisdiction, on the ground that the appeal failed to specify that it was also taken from the district court's original final judgment embodied in its minute order of August 5, 1946, which had previously dismissed the libel on identical grounds.

2. Whether the provisions of Section 2 of the Suits in Admiralty Act respecting the district in which suit against the United States under that section shall be brought are jurisdictional or waivable matters of venue.

STATUTE INVOLVED

The pertinent provisions of the Suits in Admiralty Act of March 9, 1920 are set forth in the Appendix, *infra*, pp. 20–21.

STATEMENT

Petitioner Earl P. Hoiness was a civil service seaman on the S. S. ESCANABA VICTORY, a vessel owned and operated by the United States through the former War Shipping Administration,[1] which employed American-South African Line, Inc., as ship's husband or general agent to attend to the accounting and certain other shoreside business operations of the vessel in accordance with the wartime standard form of agreement.[2] On January 16, 1945, while the vessel was docked at the port of San Francisco, California, petitioner was seriously injured when he was shot by a member of the naval armed guard or gun crew which was placed aboard the vessel by the Navy Department. To recover for his injuries, petitioner brought the present suit in admiralty against the United States, the War Shipping Administration, the American-South African Line, Inc., and others, seeking benefits under the Second Seamen's War Risk Insurance Policy, damages under the Jones Act, and maintenance and wages under the federal maritime law. The War Shipping Administration and American-South Afri-

[1] By Section 202 of the Naval Appropriation Act for 1947 (60 Stat. 481, 501), the War Shipping Administration was abolished and its functions, powers, and duties were transferred to the United States Maritime Commission.

[2] War Shipping Administration Form GAA 4-4-42, 7 Fed. Reg. 7561, 7562; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.

can Line were later dismissed from the case, and the United States is the sole respondent in this Court (Pet. 3).

Petitioner's libel, which was filed in the United States District Court for the Northern District of California, invoked the jurisdiction of that court *in personam*, pursuant to the Suits in Admiralty Act of 1920, together with certain acts amendatory thereof (R. 2). It did not allege that petitioner was a resident of the Northern District of California or that the vessel involved was found in that district at the time suit was filed. Instead, the libel alleged that the United States, the War Shipping Administration, and American-South African Line maintained offices and principal places of business at San Francisco and were within the jurisdiction of the court (R. 2). The United States did not appear specially, and no exceptions or motion to dismiss were filed. The United States answered to the merits, stating that "respondent leaves all questions of jurisdiction to the court" (R. 7, 8). Thereafter the case was heard on April 4, 1946, and submitted to the district judge on the evidence of both sides, including petitioner's testimony that he lived at Portland, Oregon, which had been his home during recent years (R. 12, 13).

The district court, of its own motion, raised the question of its jurisdiction and, on August 5, 1946, filed an opinion holding that the Suits in

Admiralty Act provides the exclusive remedy in admiralty against the United States and the War Shipping Administration for maritime tort; that there was no allegation in the libel that libelant resided or had his principal place of business within the court's jurisdiction, or that the vessel at the commencement of the action was found within the district, so as to give the court jurisdiction under that act; and that is was, therefore, without jurisdiction of the cause (R. 17–21). Pursuant to the opinion, a minute order dismissing the libel for lack of jurisdiction was entered August 5, 1946.[3] Petitioner thereupon filed a motion to reopen the case for the purpose of amending the libel to conform to the proof and for further proceedings (R. 28). Although expressly consented to by the United States (R. 29), this motion was denied by the district court on August 15, 1946 (R. 22–23). Thereafter, on October 14, 1946, the district court filed findings of fact, conclusions of law, and a formal decree purporting to dismiss the libel (R. 23–24), and petitioner appealed.

Petitioner's intention to appeal from the dismissal of his libel originally contained in the district court's minute order of August 5, 1946, was clearly shown by his assignments of error (R. 26),

[3] The printed record shows that the minute order was filed on August 15 (R. 21), but the certified transcript on file with the Clerk of this Court shows that the order was filed on August 5 (Tr. 22).

but his petition for appeal (R. 25) named specifically only the court's formal decree of October 14, 1946. The appeal was allowed by the district court in an order filed on October 18, 1946, well within the three-month appeal period from the entry of the minute order of August 5, 1946 (R. 26).

The appeal was dismissed by the Court of Appeals for the Ninth Circuit which held, Judge Healy dissenting, that the minute order of August 5, 1946, was the "final decision" within the meaning of Section 128 (a) of the Judicial Code, 28 U. S. C. (1946 ed.) 225 (a), and was appealable; that no other final decision was necessary; and that "the so-called decree of October 14, 1946, was not a final decision and was not appealable" (R. 31–32). The majority opinion stated that while the minute order directed respondent's counsel to submit findings of fact and conclusions of law, there was no reason for such direction, since the district court's opinion contained everything that was necessary for the disposition of the case; that the district court's decision was based on the libel and not on the evidence; and that the formal findings, conclusions, and decree filed on October 14, 1946, did not modify or add to what was contained in the district court's opinion and minute order of August 5, 1946 (R. 31). In his dissenting opinion, Judge Healy emphasized that the appeal which was taken on October 18 was timely as to

the minute order of August 5, no less than as to the formal decree of October 14, and concluded that there was no reason why the appeal should not be entertained as taken from the minute order (R. 34).

SUMMARY OF ARGUMENT

I

Since the minute order of August 5, 1946 was the final decision of the district court and the subsequent filing of the findings of fact, the conclusions of law, and the formal decree of October 14, 1946 were unnecessary and did not affect the finality of the minute order, the appeal to the court of appeals should have been taken from the August 5 order. Nevertheless, the dismissal of the appeal was unjustified, for although the appeal papers specified the decree of October 14, rather than the minute order of August 5, the appeal was timely as to that order and the assignments of error were framed to attack it as well as the formal decree. The defect was, consequently, one of form and not of substance, and an amendment of the appeal to cure the defect should have been permitted.

II

The provisions of Section 2 of the Suits in Admiralty Act prescribing the district in which a libel *in personam* against the United States may be brought are not jurisdictional in char-

acter but are solely matters of venue, waivable at the option of the United States. Although it has not had occasion to consider the question so far as Section 2 is concerned, this Court has construed similar provisions in other statutes as relating to venue rather than to jurisdiction. It has deemed such a construction to be in harmony with the general purpose of the particular statutes involved, and supported by the congressional policy of vesting the federal courts with a general jurisdiction expressed in terms applicable to all of them and regulating the venue by separate provisions designating the districts in which suits may be brought. Since the purpose of the Suits in Admiralty Act is to grant relief against the United States in its own courts to seamen, a class of persons whose calling often causes them to be without permanent residence, it is unlikely that the Congress would have intended to prohibit them from instituting an *in personam* suit in any district court in which the United States might be willing to defend.

ARGUMENT

I

THE FAILURE OF PETITIONER'S APPEAL PAPERS TO REFER SPECIFICALLY TO THE DISTRICT COURT'S MINUTE ORDER OF AUGUST 5, 1946, WAS NOT A SUBSTANTIVE DEFECT

We submit that the court below correctly held that the minute order of August 5, 1946, was the final decision of the district court within the

meaning of Section 128 (a) of the Judicial Code (28 U. S. C. (1946 ed.) 225 (a)), from which the appeal should have been taken, and that the subsequent filing of findings of fact and conclusions of law and the entry of a formal decree on October 14, 1946, were unnecessary and did not affect the finality of the August 5 minute order. We believe, however, that petitioner's appeal papers were sufficient to bring the matter within the jurisdiction of the court below, and that the dismissal of petitioner's appeal was erroneous.

The opinion of the district court, pursuant to which the minute order of August 5, 1946, was made and entered, noted the absence from the libel of the allegations necessary to give the court jurisdiction and referred to the provisions of the statutes which made such allegations indispensable. (R. 19–20). In the circumstances, the findings and conclusions stated in the opinion were a sufficient compliance with Admiralty Rule 46½, since they made it unnecessary for the appellate court to probe the evidence in order to ascertain the facts or to speculate on the legal grounds which formed the basis of the district court's decision. See *Kelly* v. *Everglades Drainage District*, 319 U. S. 415, 422; *The Aakre*, 31 F. Supp. 8, 23 (S. D. N. Y.), affirmed, 122 F. 2d 469, 474 (C. C. A. 2); 1 Benedict, *Admiralty*, (6th ed. 1940) 122; cf. *Matton Oil Trf. Corp.* v. *The Dynamic*, 123 F. 2d 999, 1001 (C. C. A. 2); *Dol-*

lar SS. Line v. *Matson Navigation Co.*, 23 F. 2d 554, 556 (C. C. A. 9), certiorari denied, 278 U. S. 598. The minute order of August 5, 1946, being a final decision, the subsequent entry of additional findings and conclusions did not change its character (*Bowles* v. *Rice*, 152 F. 2d 543, 544 (C. C. A. 6); *Lutjens* v. *United States*, 24 F. 2d 102 (C. C. A. 9)); nor did the filing of a formal decree affect its finality (*Better Packages, Inc.* v. *L. Link & Co.*, 74 F. 2d 679 (C. C. A. 2), certiorari denied, 295 U. S. 751; *Stradford* v. *Wagner*, 64 F. 2d 749 (C. C. A. 10); cf. *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52; *Sage* v. *Railroad Co.*, 96 U. S. 712, 714).

We believe, however, despite the finality of the minute order of August 5, that the action of the court below in dismissing the appeal was incorrect. Although the appeal papers did not specify the minute order, the appeal was timely as to that order, and the assignments of error were framed to attack that order as well as the later formal decree. Plainly, then, the defect in the appeal was not one of substance, but was of such a technical nature as to have warranted the court below in disregarding it under R. S. 954 (28 U. S. C. (1946 ed.) 777).

R. S. 954, which, after the appeal in this case was dismissed, was expressly repealed effective September 1, 1948, by Section 39 of the Act of June 25, 1948 (Pub. Law 773, 80th Cong., 2d Sess.), provided as follows:

SEC. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

R. S. 954 was a remedial statute and as such it received a liberal construction. As so construed, appellate courts, as well as others, were required to disregard the niceties of form and give judgment according to the right of the cause. *Miller* v. *Hatfield,* 309 U. S. 1; *Parks* v. *Turner,* 12 How. 39, 46. Consequently, in view of the technical nature of the defect in the appeal, it was the duty of the court below to direct an amendment thereof which would specify that it was taken from the minute order of August 5, and then to determine the appeal on its merits.

As we have indicated above, R. S. 954 was repealed as of September 1, 1948, but it does not appear that its repeal affects the instant case. Section 39 of the Act of June 25, 1948, *supra*, which repealed R. S. 954, as well as other sections of law, provided that "Any rights or liabilities now existing under such [repealed] sections or parts thereof shall not be affected by this repeal."[4] Thus, R. S. 954 would still seem to require that the appeal herein be entertained.

The reliance of the majority of the court below upon its previous decision in *Liberty Mutual Ins. Co.* v. *Pillsbury*, 154 F. 2d 559 (C. C. A. 9), certiorari denied, 329 U. S. 717, is unfounded. In that case the appeal was taken more than three months after the minute order dismissing the libel, although within three months from a later formal decree, and the court correctly held that it lacked jurisdiction because the appeal was not timely.[5] That situation did not exist in the instant case, since the appeal was timely as to the minute order and in substance was based upon it. Consequently, amending the appeal in this case would not be

[4] Although it is stated expressly in the legislative history of the repealing act (Act of June 25, 1948, *supra*) that the reason for repealing R. S. 954 was that the subject matter thereof was "Covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure" (see H. Rep. 308, 80th Cong., 1st sess., p. A239), it is not clear that those rules apply to the instant case, since Rule 81 (a) (1) of the Federal Rules expressly provides that "These rules do not apply to proceedings in admiralty."

[5] Former 28 U. S. C. 230, now 28 U. S. C. 2107.

violative of the appeal statute, but, on the contrary, would, by correcting a defect which was not substantive, permit the case to be decided according to the right of the cause.

We submit accordingly that the court below should have entertained the appeal.

II

THE PROVISIONS OF SECTION 2 OF THE SUITS IN ADMIRALTY ACT PRESCRIBING THE DISTRICTS IN WHICH SUITS SHALL BE BROUGHT ARE NOT JURISDICTIONAL BUT WAIVABLE AS MATTERS OF VENUE

Section 2 of the Suits in Admiralty Act, *infra*, pp. 20–21, authorizes the bringing of a libel *in personam* against the United States in all cases where a proceeding in admiralty could be maintained at the time of the commencement of the action if the vessel involved were privately owned or operated, or the cargo involved were privately owned and possessed. That section further provides that "Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

The libel herein failed to allege that the libelant was a resident of the Northern District of California;* nor did it allege that the vessel involved

* In fact, petitioner's own testimony shows that he resided in the District of Oregon (R. 12–13).

was found within the jurisdiction of that court (R. 1–7, 19, 20). The district court, in dismissing the libel, held it fatally defective on the ground that the provisions of Section 2 of the Suits in Admiralty Act directing where suits shall be brought are jurisdictional (R. 20). We agree with petitioner that, in a case like the present one asserting liability on *in personam* principles, these provisions relate solely to venue and may be waived.[7]

The question whether the provisions of Section 2 of the Suits in Admiralty Act are jurisdictional has not been determined by this Court nor expressly by any court of appeals.[8] How-

[7] Where the libelant asserts liability on *in rem* principles under Section 3 of the Suits in Admiralty Act (46 U. S. C. 743, *infra*, p 21), the presence within the district where the libel is filed of the vessel sought to be charged is a jurisdictional requirement. *Schnell* v. *United States*, 166 F. 2d 479 (C. C. A. 2), certiorari denied, 334 U. S. 833.

[8] The Second Circuit Court of Appeals has intimated that the provisions of Section 2 may not be jurisdictional in suits brought on *in personam* principles. *McGhee* v. *United States*, 154 F. 2d 101, 104 (C. C. A. 2); *Kunglig Jarnvagsstyrelsen* v. *United States*, 19 F. 2d 761, 762–763 (C. C. A. 2) Cf. *Carroll* v. *United States*, 133 F. 2d 690, 692–693 (C. C. A. 2). The admiralty district courts which have passed upon this point are sharply divided. Holding the statutory requirement to be jurisdictional and not waivable are the instant case (District Court for the Northern District of California, St. Sure, J.) (R. 21, 23–24); *Sawyer* v. *United States*, 66 F. Supp. 271, 276 (S. D. N. Y., Kennedy, J.); and *Rodinciuc* v. *United States*, 74 F. Supp. 284, 287 (E. D. Pa., Ganey, J.). Of the view that the provisions relate to venue and therefore may be waived are *Abbott* v. *United States*, 61 F. Supp. 989,

ever, this Court has held that similar provisions in other statutes relate to venue rather than jurisdiction. Prior to the enactment of the Suits in Admiralty Act, the requirement found in Section 5 of the Tucker Act (24 Stat. 506; 28 U. S. C. (1946 ed.) 762) that suits brought against the United States in the district courts shall be brought "in the district where the plaintiff resides" was held by this Court to be merely a formal requirement which could be waived and would be deemed to be waived in the absence of specific objection upon that ground before pleading on the merits. *United States* v. *Hvoslef*, 237 U. S. 1, 11–12; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 24. The Public Vessels Act of March 3, 1925 (43 Stat. 112; 46 U. S. C. 781–790), which was enacted to provide relief against the Government for damages caused in connection with the operation of its public vessels similar to that which had been previously provided by the Suits in Admiralty Act in connection with the operation of its vessels when employed as merchant vessels, likewise contains, in Section 2 thereof (46 U. S. C. 782), provisions prescribing the districts in which suits filed under

991–992 (S. D. N. Y., Knox, J.) (semble); *McGhee* v. *United States*, 62 F. Supp. 224, 226–227 (S. D. N. Y., Bright, J.); and *Metaxas* v. *United States*, 68 F. Supp. 667, 669 (S. D. Calif., Mathes, J.). See, also, *Haesen* v. *United States*, 66 F. Supp. 759, 760–761 (E. D. N. Y.); *Barnes* v. *United States*, 67 F. Supp. 571, 573 (S. D. N. Y.).

that Act shall be brought. In *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 216, 224, a suit brought under that Act, this Court, after stating that the jurisdiction of the district court was based on Section 24 of the Judicial Code (28 U. S. C. (1946 ed.) 41), referred to the provisions of Section 2 of the Public Vessels Act as relating to venue. Since these provisions of the Public Vessels Act are to be treated as relating to venue, the similar provisions of the Suits in Admiralty Act should be treated likewise, as the two Acts are similar in structure and purpose. See *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

The rationale of the decisions relating to similar provisions of other acts was that they should be construed in harmony with the general purpose of the particular statute and the recognized policy of Congress with regard to legislation concerning the jurisdiction of federal courts.[9] In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 384, this Court summarized the policy as follows:

> * * * Beginning with the Judiciary Act of 1789, Congress has pursued the pol-

[9] The provision in the Jones Act; Act of June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. 688, that "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located," was held to relate only to venue, conferring a personal privilege which the defendant may waive if he enters a general appearance before or without claiming it. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 383–385. See *Bainbridge* v. *Merch. & Miners Co.*, 287 U. S. 278, 279.

> icy of investing the federal courts—at first the Circuit Courts, and later the District Courts—with a general jurisdiction expressed in terms applicable alike to all of them and regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business,—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in §§ 24 and 51, one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. * * *

The purpose of the Suits in Admiralty Act is to grant relief against the United States in its own courts. Unlike private parties, the United States is ubiquitous throughout the jurisdiction of its courts. See *United States* v. *Borcherling*, 185 U. S. 223, 233. Having no particular place of residence, the United States will not ordinarily experience inconvenience in defending an *in personam* suit in a district other than that of the libelant's residence. In fact, the convenience of the United States is often best served by the trial of such cases at the principal maritime ports. Since the purpose of the statute includes the granting of relief to seamen, a class of persons

whose calling often causes them to be without permanent residence, it is unlikely that the Congress would, with the broad purpose of the statute in mind, intend to prohibit a seaman from instituting an *in personam* suit in any United States district court where the United States may be willing to defend. Indeed, the final sentence of Section 2, providing that "Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States," suggests that the Congress did not so intend.[10] We accordingly submit that the provisions of Section 2 do not restrict the substantive jurisdiction over *in personam* actions brought under that section to the district courts specified therein, where the United States disregards defective venue or otherwise shows a willingness that the suit may be brought and tried in another district.

CONCLUSION

For the foregoing reasons, we are not disposed to disagree with petitioner's contention that the judgments of the courts below failed to accomplish substantial justice. In the circumstances,

[10] This provision not only furnishes a means for correcting a defect in venue, but also makes it possible to transfer a cause to another district where necessary parties may reside or have their place of business. See *Nahmeh* v. *United States*, 267 U. S. 122, 126; *Kunglig Jarnvagsstyrelsen* v. *United States*, 19 F. 2d 761, 763 (C. C. A. 2). Cf. 28 U. S. C. 1404, 1406, enacted into law by Pub. Law 773, 80th Cong., approved June 25, 1948.

we do not oppose their reversal and a remand of the cause to the district court for a decision on the merits.

Respectfully submitted.

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APPENDIX

Sections 1 and 2 and Section 3, in pertinent part, of the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. 741–743, *et seq.*) provide as follows:

> SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of

them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. * * * If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. * * *.

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